THE HONOURABLE SRI JUSTICE GODA RAGHURAM

W.P.NO.11040 OF 2006

BETWEEN:

M/S.Nirmalanand Chemicals, Plot No.D-105/B,IDA, Hyderabad.
…petitioner

vs.

Chief Engineer, Generation-I, Hyderabad and another

…Respondents

THE HONOURABLE SRI JUSTICE GODA RAGHURAM

W.P.NO.11040 OF 2006

O R D E R:

Heard Sri D.Prakash Reddy learned counsel appearing for the writ petitioner. The writ petition is directed against the action of the A.P.Genco invoking bank guarantee No.0572/LG/26/2005, dated.25-07-2005, furnished by the 2nd respondent-Indian Overseas Bank, Hyderabad to the A.P.Genco " for the due fulfillment by them of the terms and conditions of the purchase order No.GM4119/CEG/131/APGENCO/C.S.F/280/2005, dated 16-05-2005.

The petitioner is a small-scale industry manufacturing "water treatment chemicals", claiming to have over 30 years experience in the field. Pursuant to a tender notification issued by the 1st respondent for supply of caustic soda flakes, the petitioner submitted its bid. The 1st respondent accepted the petitioner's bid and issued a purchase order dated 16-05-2005 for supply of 565 Mt of caustic soda flakes of a value of Rs.1,36,35,616/-. The petitioner submitted its bid on the basis of the terms and conditions set out in the tender schedule issued by the 1st respondent. According to Clause No.2.5 of these terms the security deposit is required to be furnished by a successful bidder within the stipulated time, equivalent to 2.5% of the value of purchase order, for proper fulfillment of the terms and conditions of the contract and full execution of supplies, an amount that is liable to be forfeited to the extent of any financial

loss suffered by the A.P.Genco in the event the supplier fails to execute the order and fulfil the terms. Clause No.2.8 requires the furnishing of a performance Bank guarantee whereunder the supplier is required to furnish an additional security in the form of Performance Bank Guarantee for satisfactory performance of the equipment over a specified period of time, to the extent of 10% of the order value. The A.P.Genco is also enabled at its discretion to invoke the Bank guarantee for recovery of any or all amounts due from the supplier in connection with the purchase order including the guarantee obligations.

Subsequently by a proceedings dated.09-01-2006 the 1st respondent short closed the initial purchase order to the extent of the accepted supplies already made by the petitioner which were of a quantity of 99.35 Mt (of a value of Rs.20,65,089/-) . According to the petitioner, in view of the communication dated.09-01-2006 of the 1st respondent the initial purchase order stood modified to the extent of the quantity of the 99.35 Mt of caustic soda flakes. The petitioner contends that in view of the terms of clause No.2.8 of the terms and conditions issued along with tender schedule the performance bank guarantee should be referable and relatable to the short closed and amended value of the order, i.e., the quantity of accepted supplies made by the petitioner as agreed upon between the parties pursuant to the communication dated.09-01-2006. On this premise, it is contended by Sri Prakash Reddy, the learned counsel for the petitioner that the performance bank guarantee need be furnished only to the extent of Rs.2,06,051/- equivalent to 10% of the amended quantity of supplies. Invocation of the bank guarantee furnished by the petitioner pursuant to clause No.2.8 should be only with reference performance bank guarantee liable to be furnished by the petitioner in view of the

changed circumstances, is the substance of the petitioner's case. However, to the consternation to the petitioner, it is contended, the 2nd respondent-Bank informed the petitioner by a communication dated.29-05-2006 that the 1st respondent had invoked, by its letter dated.25-07-2005, the bank guarantee furnished by the bank for an amount of Rs.15,64,000/-.

It is undisputed that the bank guarantee furnished at the instance of the petitioner by the 2nd respondent is an unconditional and irrevocable bank guarantee and for the due fulfillment by them (petitioner) of the terms and conditions of the purchase order dated.16-05-2005". The petitioner seeks herein to interdict the invocation of the Bank guarantee by the 1st respondent on the ground that in view of the chronology of events referred to above and in terms of the obligation of the petitioner to furnish the bank guarantee *qua* clause No.2.8, the 1st respondent is entitled to invoke if at all, only to an extent of Rs.2,65,058/- and not to the entire extent of the bank guarantee furnished i.e., Rs.13,64,000/-.

The contentions urged on behalf of the petitioner (for seeking interdicting the invocation of the bank guarantee by the 1st respondent), do not merit acceptance by this Court. The bank guarantee furnished by the 2nd respondent-Bank is on its terms and conditions, unconditional. To the extent relevant, the guarantee reads:

"We the guarantor Bank undertake to pay the amount guaranteed hereunder or such part thereof as required within one week of the same being demanded by the Corporation without reference to the supplier and without questioning the right of the Corporation to make such demand or the property or legality of the demand."

The guarantee has furnished in lieu of the cash deposit required to be made by the petitioner (to indemnify the 1st respondent to the extent of Rs.13,64,000/- representing 10% of the value of the contract against any loss or damages caused to or suffered by the said respondent by reason of any breach by the petitioner of any of the terms and conditions of the agreement), under clause No.2.8, in a value of 10% of the order value. Admittedly the initial purchase order is for supply of caustic soda flakes of a quantity of 656 Mt of a value of Rs.1,36,35,616/- and for this order the performance bank guarantee required to be furnished is of Rs.13,64,000/-, the value for which the Bank guarantee was actually furnished by the 2nd respondent-Bank to the 1st respondent. The petitioner does not in this writ petition impeach the 1st respondent's proceedings dt.09-01-2006 short closing the initial purchase order and scaling down the quantity of purchase from 656 Mt to 99.39 Mt. It is not the petitioner's case that he had furnished another bank guarantee of the value of 10% of the amended value of the supplies actually made and accepted, substituting the earlier bank guarantee furnished for Rs.13,64,000/-.

The law relating to interdiction of invocation of irretrievable and unconditional bank guarantees is too well settled. In ***U.P. Coop. Federation Ltd., Vs. Singh Consultants and Engineers(P) Ltd.,([1]),*** the Supreme Court held that a bank guarantee must be honoured in accordance with its terms as the Bank, which gives the guarantee, is neither concerned with the relations between the supplier and the customer nor with the question whether any of them have failed in their contractual obligations. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition.

Only two exceptions were recognized. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule is when there are special equities in favour of grant of an injunction, such as when 'irretrievable injury' or ' irretrievable injustice' would occur if such injunction is not granted. I n ***U.P.State Sugar Corporation Vs,. Sumac International Ltd***.([2]) the Supreme Court declared that the law on this aspect as enunciated in the ***U.P. Federation*** Case (1st supra) is settled.

The philosophy underling the general rule of non-interference/non-intervention was reiterated in ***General Electric Technical Services Co. Inc Vs. Punj Sons(P) Ltd.,([3])*** thus:-

> *" The Bank must honour the bank guarantee free from interference by the Courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere… The nature of the fraud that the courts talk about is fraud of an 'egregious nature as to vitiate the entire underlying transaction'. It is fraud of the beneficiary, not the fraud of somebody else."*

The petitioner has not established egregious fraud of which the 2nd respondent-Bank has notice and by the 1st respondent, which seeks to invoke the bank guarantee. It is only an egregious fraud that could vitiate the conduct of the 1st respondent invoking the bank guarantee. The petitioner has also not established any special equities, irretrievable injury or irretrievable injustice. The petitioner has available a raft of adjudicative remedies against the conduct of the 1st respondent either in short closing the initial purchase order or invoking the

performance bank guarantee furnished by the 2nd respondent-Bank though at the instance of the petitioner, either before an Arbitral Tribunal if there be an arbitration clause in the agreement between the parties or before a Civil Court of competent jurisdiction, in any event in appropriately drawn up proceedings the petitioner can retrieve any damage suffered on account of the alleged illegal conduct of the 1st respondent invoking the bank guarantee.

The normal rule of non-intervention in matters of invocation of bank guarantees has been reiterated by the Supreme Court in ***BSES Ltd. Vs. Fenner India Ltd***.([4]).

In the considered view of this Court no case is made out for interference. The writ petition is accordingly dismissed at the stage of admission.

GODA RAGHURAM,J

5TH JUNE 2006
*TSNR/PVSN

[1] (1988)1 SCC 174
[2] (1997) 1 SCC 568
[3] (1991) 4 SCC 230
[4] 2006 AIR (SCW) 721